FA 59/1995
BEFORE

THE HON'BLE MR.JUSTICE HN SARMA
J U D G M E N T

Having suffered by a Decree dated 30.1.95 passed by the learned Additional District & Sessions Judge, Dibrugarh, in Title Suit No 31/1977, the defendants have filed this First Appeal.

2. I have heard Mr AK Bhattacharyya, learned senior Advocate for the appellant and Mr BK Goswami, learned Senior Advocate for the respondents.

3. The respondent No 1 as plaintiff filed the aforesaid suit for specific performance of contract dated 25.5.80 that was entered into between the plaintiffs and the defendant No 1 for sale of an area of land measuring approximately 421.49 acres situated in the district of Dibrugarh.

3. The pleaded case of the plaintiff, inter alia, is that he having tea garden in the district of Dibrugarh, Assam and being desirous to purchase the suit land and the defendant having agreed to sell the same entered into an agreement with the defendant No 1 on 25.5.80 to purchase the suit land, and defendant accepted a sum of Rs. 5000.00 as advance out of the total consideration money which was fixed at Rs. 1,89,070.00. It was also agreed that the plaintiff would be at liberty to investigate the title of the defendant over the suit land and such investigation would be completed within 60 days from the date of signing of the agreement failing which the title of the owner deemed to have been accepted by the purchaser. It was further agreed that the land in question would be sold as it is on the date of the agreement and any change, if at any time before the competition of the purchase takes place in that event also the agreement would remain in force and the purchaser would have to buy the suit land paying full consideration. The parties also agreed to bear the expenses for preparation of the agreement equally and the expenses for preparation of sale deed, stamp and registration fee should be borne by the purchaser alone. The plaintiff in pursuance of the aforesaid agreement paid Rs. 5000.00 as earnest money which was accepted by the defendant No 1 and it was also agreed later on by exchange of letters that the conveyance would be executed in favour of the plaintiff or his nominee. Apart from the above pleading a specific averment has also been made by the plaintiff that he is still ready and willing to buy the suit land in terms of the said agreement and to perform his obligation thereunder. Though the plaintiff through his solicitor requested the defendant No 1 for sending documents of title, the defendant No 1 did not comply with the same. However, the plaintiff accepted the title of the defendant over the suit land. When vide letter dated 10.6.75, the defendant No 1 was requested to perform the contract as per the agreement dated 25.5.70 to sell the land to the plaintiff or his nominee, the defendant vide letter dated 13.9.75 repudiated the agreement and refused to perform his part of obligation under the agreement. The plaintiff has also pleaded that if it is held by the Court that the plaintiff is not entitled for specific performance of the contract, the plaintiff is entitled to claim damages in lieu of specific performance of the agreement which is assessed at Rs. 6,34,309.50 being the diference between the market price of the land on the date of breach of the agreement and the contract price thereof. The plaintiff also alternatively claimed damages at such rate and/or on such basis as the Court might deem fit. The plaintiff also pleaded justification of impleading the defendant No 2 in the suit stating that the earlier both the defendant Nos 1 and 2 were common and they were separated later on. Pleading in the aforesaid manner, the plaintiff made the following prayers:
(a) Decree for specific performance of the said agreement dated 25th May 1970 with regard to the said land agreed to be sold thereunder;

(b) Decree directing the defendants, their servants or

agents to sell and convey the said land in favour of the plaintiff or his nominee and to execute and register the necessary conveyance in terms of and under the said agreement dated 25th May 1970;

(c) Decree directing the defendants to do all acts and deeds necessary for carrying out the terms and conditions of the said agreement and for the execution and registration of the appropriate conveyance of the said property or land in favour of the plaintiff or its nominee as aforesaid;

(d) Delivery of vacant possession of the said land by the defendant in favour of the plaintiff;

(e) Alternatively, decree for Rs. 6,54,309.50 as damages in lieu of specific performance under paragraph 13 thereof or alternatively, and if necessary, an inquiry into the loss and damage suffered by the plaintiff and decree for the sum found due upon such inquiry;

(f) Decree for Rs. 5,000.00 under paragraph 15 A thereof, together with interest of Rs. 4,375.00 if specific performance is not granted by the Hon'ble Court;

(g) & & & & & & & & & & & & & &.

(h) & & & & & & & & & & & & & &.

(i) & & & & & & & & & & & & & & &.

(j) & & & & & & & & & & & & & & &. .

4. The defendants by filing written statements resisted the claim of the plaintiff. Pleading the usual plea like want of cause of action, limitation, mis-joinder of necessary party, the defendants have admitted the execution of the agreement with the plaintiff to sell the suit land on the terms and conditions mentioned in paragraph- 2 of the plaint. The defendants have also admitted receipt of Rs. 5,000.00 as advance from the plaintiff. Similaly averments made in paragraphs- 5, 7 and 8 of the plaint are also admitted. However, the defendants denied the breach of the terms and conditions of the agreement by refusing to sell the suit land to the plaintiff. The defendants have further pleaded that in view of the provisions of the Assam Fixation of Ceiling on Land Holding Act and the provisions of the Foreign Exchange Regulations Act, 1973, the agreement is not executable and the agreement dated 25.5.70 is not binding upon the defendant No 2 as they did not give any undertaking as per the said agreement. The defendants deny the entitlement of the plaintiff for specific performance of the contract. Similarly, the claim for damages has also been denied. Pleading in the aforesaid manner, the defendants have prayed for dismissal of the suit.

5. On the basis of the pleadings of the parties, the learned trial Court framed the following issues:

1) Whether the suit is maintainable ?
2) Whether there is any cause of action ?
3) Whether the suit is barred by limitation ?
4) Whether the suit is bad for misjoinder of Jokai India Ltd ?
5) Whether the defendant No 1 is also carrying on business in the Dibrugarh district ?
6) Whether the plaintiff was and is still ready and willing to buy the land in terms of the agreement ?
7) Whether the defendant No 1 committed breach of the agreement by refusing to sell and deliver to the plaintiff the land or any portion thereof in spite of de

mands made on behalf of the plaintiff ?
8) Whether it became impossible for the defendant to carry out his obligation under the contract due to operation of law and the contract became void ?
9) Whether the agreement dated 25.5.70 has any binding effect on defendant No 2 ?
10) Whether the plaintiff is entitled to specific performance of the agreement dated 25.5.70 ?
11) Whether the defendant is entitled to claim damages & &(torn out) of specific performance and whether the & &(torn out) of Rs. 6,54,309.50 as damage is highly inflated ?
12) Whether the plaintiff is entitled to refund of Rs. 5000.00.
13) Whether the agreement between the plaintiff and the defendant No 1 is binding on defendant No 2 ?
14) Whether there is any cause of action against the defendant ? .

6. During the course of hearing the plaintiff examined himself as witness and exhibited six documents, whereas the defendants preferred not to adduce any evidence, oral or documentary,

7. At the end of the trial the learned trial Court decided the relevant issues in favour of the plaintiff and decreed the suit directing to carry on the obligation of the specific performance of the contract agreement dated 25.5.70 provided the plaintiff offer balance consideration of money from the date of the decree and to deliver khas possession of the suit land, which is challenged in this first appeal.

8. In support of the appeal, Mr Bhattacharyya, learned Senior Advocate for the appellant submits that the documents referred in the plaint not having filed by the plaintiff along with the plaint and no schedule having been provided in the plaint identifying the suit land, the suit is defective and no relief could have been granted in such a suit. It is further submitted that the plaint did not contain a list of documents including the agreement which is violative of Order 6, Rule 39 and 7, CPC, and Order 7, Rules 14 and 8, Rule 1A, CPC. It is submitted that there is no foundation led by the plaintiff to get a decree and the plaintiff not having been able to prove his own case, the decree so passed by the learned trial Court is not sustainable. Raising the plea of limitation by the learned senior counsel referring to Article 54 of the Limitation Act, submits that such limitation for filing a suit for specific performance of contract being three years; the suit is barred by limitation. The learned counsel finally submits that the decree for specific performance of contract being a discretionary one, in the facts and circumstances of the case and in view of the patent defect in the suit, the learned trial court erred in law and facts in exercising discretionary power to decree the suit.

9. Mr Goswami, learned senior advocate for the respondent, on the other hand, refuting the contention raised by Mr Bhattacharyya, submits that the defect so referred by the appellant are curable one and the defendants not having denied the agreement and the terms and conditions thereof are not entitled to resile from the same. It is further submitted that the terms of the agreement were to the effect that the sale transaction would be completed after resurvey of the area by the defendants within 45 days following handover of the vacant possession of the suit land to the purchaser, the point of limitation would start from that date and accordingly, the suit having been filed within 3 years of refusal to perform the contract, the suit is not barred by limitation. The learned counsel further submits that the defendants not having denied the categorical statements made by the plaintiff in support of its case, by adducing any evidence in support of their case, the appellant is not entitled to raise those objections at this stage. It is also submitted that the learned trial court having exercised the discretion to pass the decree for specific performance of the contract, the same is not required to be interfered with by this Court in this appeal in the absence

of any illegality that could be pointed out by the appellant.

10. I have considered the rival submissions made by the learned counsel for the parties. The following decisions have been cited at the Bar during the course of hearing.

1. Jiwan and another Vs Nawab and another,
AIR 1926 Lahore 527.

2. Ramzan Vs Smt Hussaini,
AIR 1990 SC 529.

3. AIR 1976 744.

4. Atul Castings Ltd Vs Bawa Guruvachan Singh,
(2001) 5 SCC 133.

5. Pancharan Dhara & Ors Vs Monmatha Nath Maity(D) by LRs & another, AIR 2006 SC 2281.

6. Balraj Taneja and another Vs Sunil Madan and another, (1999) 8 SCC 396.

7. Narbada Devi Gupta Vs Birendra Kumar Jaiswal and another, (2003) 8 SCC 745.

8. Anil Rishi Vs Gurbaksh Singh, (2006) 5 SCC 558.

11. The pleadings of the parties disclose that the suit filed by the plaintiff is for specific performance of the contract entered into vide agreement dated 25.5.70, the defendants admitted the agreement as well as receipt of the advance money. The plaintiff has filed the suit complying with all the necessary requirements that are necessary in order to obtain a decree for specific performance of the contract, namely the plaintiff has made specific averments that he is still ready and willing to purchase the suit land and to pay the defendants the balance consideration money; that if the Court alternatively finds that the specific performance of the contract is not possible, the plaintiff may be awarded damages as claimed. The defendants in their written statements though admitted the factum of execution of agreement also admitted receipt of advance but raised a plea about the impossibility of performance of the contract on account of statutory bar under the provisions of the Assam Fixation of Ceiling on Land Holding Act and/or the Foreign Exchange Act, 1973. The plaintiff in support of his case examined PW- 1. PW- 1 exhibited the agreement in question as Ext- 3. The condition of which have been quoted in the plaint, which are in turn admitted by the defendants. Though the defendants did not examine any witness but cross-examined PW-1, the plaintiff, who in his cross-examination it is also stated that the Ext- 3 is not original agreement but the said agreement and the terms thereof are not disputed. It is admitted in the written statement itself and has not denied at any stage. During the course of trial, the defendants did not take any steps for exercising their right to produce the original of the Ext- 3 by way of discovery or otherwise. In such a situation, the terms and conditions contained in Ext- 3 which were incorporated in the plaint are binding upon the parties and the same cannot be said to be unenforceable on that count.

12. Although the defendants took the plea questioning the impossibility of performance of the contract, no evidence was adduced by the defendants to that effect. The learned counsel for the appellant during the course of hearing of this appeal has also not raised the said point of maintainability on account of the statutory bar as alleged in the written statements. In fact, the learned counsel has admitted that the provisions of the Foreign Exchange Act are not applicable in the facts and circumstances of the case. Regarding the bar under the provisions of the Assam Fixation of Ceiling on Land Holding Act, to succeed on that po

int, it is the burden of the defendants to prove the said fact by producing nece ssary evidence, oral and documentary, showing and establishing that the suit lan d in question falls within the excess land under the Act. But the defendants fai led to discharge the said burden and the said defence remained unproved and ines tablished.

13. Though strenuously urged that the plaintiff not having complied with the provisions of Order 6, Rule 2 and Order 7, Rule 14, CPC, by not producing the d ocument, which was relied on it, does not appear from the record that those poin ts were raised before the learned trial Court. In fact, the aforesaid irregulari ties are not substantial in nature. In view of clear admission of the defendants about the vital portion of the facts pleaded in the plaint, submissions of Mr G oswami in this regard that even if there are certain irregularity to that effect , the decree so passed should not be reversed or modified for such irregularity not affecting the merits or jurisdiction of the trial Court is not misplaced. Th e aforesaid provisions relates to the procedure, more particularly, to be follow ed in filing the suit and prior to the admission of the suit. The defendants ne ver raised such objection before the learned trial Court although they fully par ticipated in the proceeding. In terms of section 99, CPC, the decree so passed s hall not be reversed nor be remanded on account of any error or defect or irregu larity in any proceeding in a suit not affecting the merits of the case or juris diction of the Court. Accordingly, the contention raised by the learned counsel for the appellant in this regard is not sustainable.

14. Regarding the point of bar of limitation in filing the suit, the counsel submits that the agreement was executed on 25.5.70 and the suit was filed on 30 .9.77 and the period of limitation for such specific performance of contract bei ng three years under Article 54 of the Limitation Act, it is clearly barred by l imitation. Admittedly, the agreement was executed on 25.5.70 but in the agreemen t itself there is a clause that the sale would be effected on the resurvey of th e area by the defendants and within 45 days following handover of the vacant pos session to the purchaser. But the defendants neither resurveyed the area nor han ded over the vacant possession of the suit land to the plaintiff in terms of the said agreement and the limitation would start as per second part of Article 54 of the Limitation Act, ie, from the date so fixed for resurvey by the parties i n their agreement. The plaintiff filed the suit when the defendants expressed th eir intention not to perform the contract as per letter dated 13.9.75 (Ext- 7) a nd the suit having been filed within the period of three years from that date, t he suit was filed within the period of limitation and the plea of limitation as raised by the learned counsel for the appellant is not tenable. The ratio of the decision rendered by the Apex Court in Pancharan Dhara & Ors Vs Monmatha Nath M aity(D) by LRs & another (supra) is squarely applicable in this case.

15. In the instant appeal, the appellant accepted the agreement in question. The appellant have not raised the issue of any subsequent development or that p ayment of damages would provide adequate relief to the plaintiff nor they have r aised any such conduct of the plaintiff disentitled him from getting the relief specific performance of the contract and not called upon to answer.

16. The learned trial court upon proper assessment of the evidence and mater ials on record decreed the suit. The defendants though filed written statements denying their liability but admitting the vital factual averments including the averments of the appellant, made in the plaint have not preferred to appear in the witness box in support of their plea of impossibility of performance of the contract. Consequently, the provisions of section 114 (g) of the evidence Act wo uld also operate against the defendants.

17. On over all consideration of the materials available on records, I find that there are sufficient materials in favour of the plaintiff justifying for pa ssing a decree in his favour. The defendant / appellant could not substantiate a

ny of the points as raised during the course of the argument. The learned trial Court has not committed any illegality or irregularity in passing the impugned judgment and decree.

18. In view of the aforesaid discussions, I do not find any merit in this appeal justifying interference with the impugned decree. Accordingly, the appeal stands dismissed leaving the parties to bear their own costs.